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No. ____

IN THE

Supreme Court of the United States

LEWIS PERDUE,

Petitioner,

—v.—

DAN BROWN and RANDOM HOUSE, INC., IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When deciding whether part of a literary work is "substantially similar" to protected expression in a previously copyrighted literary work, should a court look to the two works alone, or should it also consider expert affidavits?

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JURISDICTION

The district court had exclusive copyright jurisdiction pursuant to 28 U.S.C. § 1338. This Court has jurisdiction under 28 U.S.C. § 1254. The Court of Appeals for the Second Circuit entered its decision on April 18, 2006. Circuit Justice Ruth B. Ginsburg extended the time to file a Petition for Writ of Certiorari to August 15, 2006. This Petition is filed on August 8, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, § 8, cl. 8:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

17 U.S.C. § 102:

> (a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include the following categories:
>
> (1) literary works . . .
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea . . . .

Federal Rule of Civil Procedure 56. Summary Judgment:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> . . .
>
> (e) . . . Supporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence.
>
> . . .

Federal Rule of Evidence 702. Testimony by Experts

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . .

Federal Rule of Evidence 704. Opinion on Ultimate Issue

> (a) . . . testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

STATEMENT OF THE CASE

The federal copyright law question presented here divides the Circuits. Because of different rules concerning the admission of expert testimony, a victim of

infringement in Los Angeles can use expert testimony in federal court to support his claims on a certain element of copyright infringement, but a victim in New York may not. This Court should grant review to eliminate that disparity and to ensure uniformity in American copyright law. Then it should order that the case be remanded for further proceedings on the merits.

This case concerns the copying of a plot and other details from an original work, which is protected by 17 U.S.C. § 102(a)(1). This kind of copyright violation is what a leading treatise calls "nonliteral similarity," which can either be "comprehensive" or "fragmented." M. Nimmer and D. Nimmer, COPYRIGHT, § 13.03[A][1] (2005). As the district court recognized, copyright "protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." Petn. App. 19a, *quoting* Z. Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 515 (1945). *See also Feist Publication, Inc. v. Rural Telephone Service*, 499 U.S. 340, 348 (1991) ("minimal degree of creativity" in selection, coordination or arrangement of facts would be protected).

The claim is not that the original work was copied word-for-word. Rather, it is that the infringing work misappropriated not only the uncopyrightable idea of the original book, 17 U.S.C. § 102(b), but also the expression of that idea in a detailed plot, including the sequence of events, characters, motivations, and fictitious history and theology. The existence of dissimilarities does not automatically "relieve the infringer of liability as 'no copier may defend an act of plagiarism by pointing out how much of the copy he has not pirated.' " Petn. App. 20a, *quoting Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992). Similarly, the jury may take into account the

degree of contribution the original work made to the infringing work when fixing damages for copyright infringement. 17 U.S.C. § 504(b).

Proceedings. In 2000, Lewis Perdue authored a book, DAUGHTER OF GOD. Respondents conceded for purposes of their summary judgment motion that Dan Brown used DAUGHTER to construct his subsequent 2003 best-seller, THE DAVINCI CODE. Cir. App. 388.[1] The question is whether what Brown took is substantially similar to the protected elements of what Perdue originally wrote, including the details of his plot.

For example, both books turn on a fictional allegation that the Emperor Constantine and then the Catholic Church suppressed physical evidence of the "divine feminine." In both, there is a multiple party race to find this evidence. The common contenders are not only the protagonists, but also a conservative organization affiliated with the Catholic Church, and those who wish to use the evidence to discredit or blackmail the church. In both, the parties find some evidence, but at the end do not have the critical evidence. In Perdue's book, the divine feminine is represented by a fictional 4th Century female messiah named Sophia. In Brown's book, the divine feminine is represented by Mary Magdalene, whose story Brown copied from yet another book, HOLY BLOOD, HOLY GRAIL.[2]

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[1] In this Petition, "Cir. App." means the parties' Appendix submitted to the United States Court of Appeals for the Second Circuit.

[2] In a London suit by two of the authors of HOLY BLOOD, HOLY GRAIL, the court found that Brown had copied the Mary Magdalene-Priory of Sion story from that book. More precisely, the court found that Brown did no research but instead worked from a synopsis and other materials provided by his wife which copied from that book. The court nevertheless held for Random House (Brown's publisher) because i) Brown's character in the novel refers to HOLY BLOOD, HOLY GRAIL, ii) the copied material was mostly factual, and

Perdue's readers began emailing him about the similarities immediately after publication of DAVINCI.[3] He complained to Random House. Eventually Brown and Random House sued him in the Southern District of New York and sought a declaration that they had not violated Perdue's copyright. Perdue filed a counterclaim which brought in the companies involved in making the DAVINCI movie, who are also respondents.

In general, proof of infringement requires proof that the infringer in fact copied the original work, and that the copying is actionable because the infringing part is "substantially similar" to the protectible elements of the original work. Nimmer, *supra*, at § 13.01[B]. In the Second Circuit, the first element of actual use is called "access," which may be proven by either direct proof of copying or expert testimony concerning "probative similarity" of the two works. Petn. App.18a.

Random House and the other respondents moved for summary judgment, and, for the purpose of that motion, confessed access, or actual use.

Random House agreed that the test for actionable copying then turns on whether there is "substantial similarity" between the two works. Cir. App. 388. In the Second Circuit, "substantial similarity" depends on the viewpoint of the "average lay observer" as determined from the language of the works themselves. Petn. App. 18a. Because only the language of the books is considered relevant, the Circuit classifies all other evidence as

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iii) the earlier book presented the facts in chronological order, which showed no unique "architecture." *Baigent v. The Random House Group Limited*, [2006] EWHC 719 (Ch), 2006 WL 1020604, ¶¶ 194, 204, 215, 218, 221, 273, 297, 306-07, 315, 343, 348. The English Court of Appeal has granted Baigent leave to appeal.

[3] Brown also borrowed to a lesser degree from Perdue's 1983 book, THE DAVINCI LEGACY. *See* n. 6, *infra*.

being irrelevant. *See* pp. 14-15, *infra*. Therefore, although Perdue filed a Fed.R.Civ.P. 56(f) affidavit and sought discovery, the district court disregarded the request.

Random House offered no evidence to support its motion other than attorney affidavits which attached the books in question and portions of a few other books on subjects common to the novels. Cir. App. 99-121, 370-382.

In opposition, Perdue filed evidentiary affidavits. Two were Perdue's and two were from experts, one literary expert and the other forensic linguist. The district court refused to consider them. Petn. App. 18a. It said:

> In support of his claims of substantial similarity, Perdue also submits declarations from John Gabriel Olsson, a specialist in forensic linguistics and Gary Goshgarian, a professor of English at Northeastern University. However, because substantial similarity is judged by the spontaneous response of the ordinary lay observer, expert analysis of the similarities between the two works is not determinative. *See Denker v. Uhry*, 820 F.Supp. 722, 729 (S.D.N.Y. Dec. 8, 1992) (finding expert testimony unnecessary to assess substantial similarity if the proferred testimony does not deal with evidence or material that might help gauge the response of the lay reader).

Id. The district court held that no reasonable juror could find that the protected parts of DAUGHTER were "substantially similar" to the parallel parts of DAVINCI. Petn. App. 35a. In its findings the court "filtered out" certain elements of the plot. In doing so, it applied its own beliefs concerning such matters as what was or was not a historical fact, or "original in the genre," or a stock theme, or a stock device necessary to a particular theme,

sometimes called a *scene a faire* ("scene which must be done"). Petn. App. 22a-25a. For example, the court dismissed 28 similarities between the books as "unprotectible ideas, historical facts and general themes." Petn. App. 22a.

After eliminating these similarities, it then examined such matters as the "thematic expression," the book's "total concept and feel," plots, and characters, as well as "sequence, pace, and setting," all of which it found dissimilar. Petn. App. 25a-33a.

Perdue appealed the rejection of his affidavits.[4] The Second Circuit, in a brief per curiam opinion, affirmed the "decision below for substantially the reasons given by the district court." Petn. App. 5a.

What the affidavits said. The district court's ruling did not depend solely on the works themselves, but rather turned on numerous assumptions concerning both history and literature. But the affidavits contradicted the Court's assumptions about history, about literature, about the genre, and about which scenes and devices were "stock." If the affidavits had been admitted, genuine issues of material fact would have required that the case be sent to a jury, which is the body to decide disputed copyright infringement cases. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 351-53 (1998) (Seventh Amendment right to jury trial even on statutory damages).

Gary Goshgarian, who authored one affidavit, is a professor of English at Northeastern University. He has published several novels, teaches detective fiction, and belongs to several associations of mystery writers. Cir. App. 294-295.

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[4] *See* Brief of Defendant-CounterClaimant Appellant 21, 29, 34-37; Reply Brief of Defendant-CounterClaimant-Appellant 26-33. These are briefs Perdue filed in the Second Circuit.

John Gabriel Olsson, who authored the other, specializes in forensic linguistics and has written a textbook on that subject. Cir. App. 309. After 13 pages of analysis, he concluded that "the evidence of infringement is overwhelming." Cir. App. 322. The affiants provided evidence that should have prevailed over the district court's surmise on a number of important points.

Elements are Fiction, Not Fact. An important element in each book is that the Catholic Church, beginning with Emperor Constantine and the Nicean conference in 325 A.D., made Christianity an exclusively male religion. The district court read an ambiguous statement in Perdue's fiction in the light most *un*favorable to Perdue and treated this as *fact*. Petn. App. 24a.

But affidavit evidence says Perdue invented the fictional flesh-and-blood Sophia as well as her persecution by Constantine. In truth, Constantine had nothing significant to do with the role of women in the church, and, neither did the Nicean conference. Cir. App. 211, 214-215, 218-219. *See also* Cir. App. 107, 109-110 (Gnostic gospels mentioning women were rejected before 200 A.D.); Cir. App. 379 (Nicean conference discussed priestly celibacy, but reached no conclusion). Perdue invented Constantine's demonization of the sacred feminine, and Brown copied him.

Similarities not "stock". Professor Goshgarian, an expert on mystery fiction, said that the similarities between the two books were "not stock and are non-generic." Cir. App. 296. He added that, to his knowledge *only two* mystery thrillers have the theme that evidence of the divine feminine exists which is a threat to the Catholic church, and that they are DAUGHTER and DAVINCI.[5] *Id.* This contradicts the district court's finding

[5] He added that one other novel portrays Jesus returning as a woman at the resurrection.

that the books' themes were to be expected in a "mystery thriller set against a religious backdrop." Petn. App. 22a.

According to Goshgarian, the following similarities between the two books are not "stock" or "generic" to the thriller genre and even the stock elements are in a particular sequence. He begins with the unique "threat to the church" nature of the two novels. Then he notes that:

* While thrillers often begin with murders, the similarities between the two novels are "not stock and are non-generic." Cir. App. 296. In both, an older art expert has a church-shaking theological secret. Just before being gruesomely murdered, he gives clues to a younger heroine. She is led to a painting originally painted on wood, which physically contains a gold key. The keys begin the book-long quest to discover a truth hidden for centuries which, if revealed, could topple the Catholic Church.

* Both keys are gold, do not actually turn a lock, and are imprinted with a symbol. Both paintings are named for the Madonna—"Madonna of the Rocks" and "Home of Our Lady of the Redeemer."

* Swiss banks are stock venues in thrillers. However, the sequence of events is unfamiliar and "suspiciously similar." Cir. App. 297. In both books, the key leads to a Zurich bank where a safe deposit box contains another locked container which holds physical evidence regarding the sacred feminine. *Id.* The hero has been accused of murder, and so the protagonists must break out of the bank to escape death or capture. *Id.*

The bank scene to which the affidavit refers illustrates Brown's "reworking technique":

> DAUGHTER, [308].
>
> [Ridgeway] and Zoe looked silently about them. The room was the size of a luxury hotel room and

> furnished in much the same way. . . [Ridgeway] went to the wet bar, set the wrapped painting down on the counter, and filled a tumbler with water from a chilled bottle of Perrier.
>
> DAVINCI, [194-196].
>
> Langdon and Sophie stepped into another world. The small room before them looked like a lavish sitting room at a fine hotel. . . . On the broad desk in the middle of the room, two crystal glasses sat beside an opened bottle of Perrier, its bubbles still fizzing.

* Both books focus on evidence that shows a cover-up which could topple Christendom.

* The relics are similar (a shroud, a tomb) and in both novels are either lost or not found, which maintains the stability of the church.

* In both novels, the protagonists are opposed by representatives of secretive religious organizations. Cir. App. 297.

Selection, coordination, and arrangement. These factors, taken from *Feist*, make up what the Second Circuit calls a "total concept and feel" case. Petn. App. 28.

Professor Olsson's linguistic analysis says that 65% of the 100 similarities between the two books are in the same sequential order and are "striking." He identified several important similarities and showed how all but one of them appeared at virtually the same places in the two books. Cir. App. 312. They are, with DAUGHTER and DAVINCI pages given respectively:

> The opening murder of the art expert (11,15).
>
> The hero and the expert are acquainted (15, 22).

The existence of the secret documents or evidence (175, 158).

The "explosive" secret of the divine feminine (226, 239).

Hero is accused of having committed murder (260, 47).[6]

Characters. Linguist Olsson's affidavit lists the similarities between the characters:

* Male protagonist—late 30's to 40's, claustrophobic professor of comparative religion or religious symbology who is an expert on Constantine and is "captivating".

* Female protagonist—art broker or has an intense art interest, raised by artistic male after family tragedy, younger than male protagonist, speaks two languages and is involved in law enforcement or forgery detection. Cir. App. 316.

* Character who befriends the protagonists but is really working, or is supposedly working, for an ambitious cardinal or bishop who wants the evidence to persuade the Vatican to make him Pope or to persuade it to fund his organization. Cir. App. 321 ("shapeshifter") (Stratton, Teabing).

These character similarities can be gained from the books themselves, but Olsson's affidavit makes comparison much easier because each book exceeds 400 pages in length. Also, another connection between the female protagonists cannot be found by analyzing the

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[6] On page 35 of both DAVINCI and Perdue's DAVINCI LEGACY (1983), the expert uses his own blood to write his last message on himself. This is not a separate claim, but is further evidence of copying. Brief of Defendant-CounterClaimant-Appellant p. 37.

two works. In DAUGHTER, Zoe is named for the daughter of the goddess mother of God in Gnostic literature, Sophia, Cir. App. 317, hence the title, "Daughter of God." In DAVINCI, the female protagonist is actually named Sophia, and she is described as a descendant of Jesus, i.e., another "daughter of God." Cir. App. 317.

In sum, the affidavits, based on knowledge of historical facts and literary expertise not found in the books, contradicted the district court's findings concerning both stock literary devices and historical facts. They pointed out connections based on the meaning of names that cannot be drawn from the books themselves. If admitted, they also would have significantly informed any attempt to compare the two books.

In reviewing a summary judgment motion, it is the district court's job to examine the evidence in the light most favorable to the non-moving party, *i.e.*, to Perdue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The question is whether, in that light, a reasonable juror could find that what Brown took is substantially similar to protected elements of the Perdue novel. If the affidavits are considered, there is more than enough evidence for a reasonable juror to reach that conclusion. If the affidavits are considered, they create numerous genuine issues of material fact that only a jury can resolve. Brown can argue that the district court's surmise is plausible, but he cannot argue that it is in agreement with the affidavits. *Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002) (Kozinski, J.) (dispute over substantial similarity of TV plots should go to jury).

REASON FOR GRANTING THE PETITION

Despite, or perhaps because of, the simple language of the 1976 Copyright Act, the Circuits disagree about its interpretation, particularly when the "substantial similarity" of two works is in question. This Court has never spoken on these issues. Nimmer, *supra*, at § 13.03[E][1].

This Court should grant certiorari and resolve the conflict concerning the use of expert testimony, which is the distinction among the Circuits that is susceptible to a yes or no answer, is directly at issue in this case, and makes the most practical difference.

The Circuits are in conflict concerning the role of expert witnesses in applying the "substantial similarity" test.

The Circuits use a variety of tests to determine whether protected expression in an original work has been copied in a substantial way. One treatise describes the principle difference as follows:

> There are differences in how courts in the twelve federal circuits compare works in copyright infringement cases. Most courts use one of two tests: the copying/unlawful appropriation test associated with the Second Circuit or the extrinsic/intrinsic test associated with the Ninth Circuit.

R. Osterberg and E. Osterberg, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 3 (2005). *See also id.* at §§ 3.1-3:4 (describing differences in detail); Nimmer, *supra* at § 13.03[E][3] (describing different tests and different rules governing experts); *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312 (6th Cir. 2004), *cert. denied*, 543 U.S. 959 (Boggs, J.) (fashioning Sixth Circuit rule out of different tests in other circuits); *Positive Black Talk, Inc. v.*

Cash Money Records, Inc., 394 F.3d 357, 374 n. 13 (5th Cir. 2004) (distinguishing Fifth Circuit test from Ninth Circuit test).

In this case, however, the relevant difference is whether a circuit will allow expert testimony on the issue of substantial similarity. More particularly, it is whether expert testimony may be used when determining which parts of the original work are "protectible," *i.e.* show originality and are not historical facts or stock scenes from a recognized literary genre. The "use of expert testimony in copyright cases has received widespread judicial attention." *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300 (D.C. Cir. 2002). As the treatise again explains:

> Although some courts have considered expert opinions concerning whether the works are substantially similar, the majority rule is that expert testimony may not be considered with respect to substantial similarity because whether two works are substantially similar is to be determined by the fact finder without the aid of expert testimony.

Osterberg, *supra*, at § 16-4 (footnotes omitted). In more detail, these are rules of the various circuits:

No expert.

The Second Circuit allows expert testimony to prove copying, or "probative similarity," but, once some copying is conceded, it prohibits expert testimony to show works are "substantially similar," *i.e.*, that the copying was "unlawful." *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). It developed this rule long before the adoption of the Federal Rules of Evidence, and in particular Rule 702 concerning experts. But it has steadfastly adhered to it even after the adoption of that rule. *Walker v. Time Life Films,*

Inc., 784 F.2d 44, 51 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986); *Computer Associates Int'l., Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992) (because test is lay observer test, expert testimony is "irrelevant").

The First Circuit follows the Second Circuit. *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 66 n. 11 (1st Cir. 2000), *cert. denied*, 531 U.S. 827 (2000) ("there should be no expert testimony to establish whether or not there was substantial similarity").

The Third Circuit agrees with them. *See Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 208 (3d Cir. 2005) (expert testimony on substantial similarity would be improper on remand); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62 (3d Cir. 1978), *cert. denied*, 439 U.S. 880 (1978) (dictum).

Apparently, so does the Fifth. *Positive Black Talk, Inc., supra*; *Sahuc v. Tucker*, 300 F.Supp.2d 461, 465 n. 1 (E.D. La. 2004).

Both the Seventh Circuit, *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982), and the Court of Federal Claims, *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 18 (Ct. Cl. 2005), have said expert testimony is not admissible.

Expert allowed.

The Ninth Circuit permits expert testimony on the very matters on which the Second Circuit disallows it, "plot, themes, dialogue, mood, setting, pace, [characters], and sequence [of events]." *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) (looking to expert testimony on plot). It considers these matters part of its "extrinsic" test. If the court finds that reasonable minds might differ on these elements, it sends the case to the jury, which also

considers an "intrinsic test," *i.e.*, whether an ordinary reasonable person would think there was enough similarity to support an infringement claim.[7] *Id.* at 1358. *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004) (reversing defense summary judgment because expert affidavit created disputed issue on stock elements); *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 n. 2 (9th Cir. 1987), *cert. denied*, 484 U.S. 954 (1987) (reversing defense summary judgment and approving use of expert testimony on retrial); *Griffin v. J-Records*, 398 F.Supp.2d 1137, 1141 (E.D. Wash. 2005) (reliance on defense expert).

The Fourth Circuit also allows expert testimony on these subjects. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 733, 736 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990) (reversing summary judgment; expert testimony on pattern, theme, organization, as well as reaction of intended audience allowed).

The Sixth Circuit allows expert testimony concerning the "extrinsic" test, but has not adopted each detail of that test and has said it applies "a more stringent standard" concerning expert testimony. *Murray Hill Publications, Inc., supra*, at 318. *See also Kohus v. Mariol*, 328 F.3d 848, 857, 858 (6th Cir. 2003) (expert testimony required to inform jury under "intended audience" standard; lay audience needs "interpretational guidance"); *Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (refusing to remand for expert discovery where lack of similarity obvious); *Tiseo Architects, Inc.*

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[7] Expert testimony is not technically admissible on the subjective "intrinsic test," but once there are disputed issues of fact on the "extrinsic" test, the case automatically goes to the jury on both tests. *See Shaw, supra*, 919 F.2d at 1359. As a result, expert testimony can create an issue of material fact requiring trial in these circuits, while it cannot in the "No expert" circuits. Because the affidavits here included material facts which the respondents did not admit, this case would have gone to the jury in the "Expert allowed" circuits.

v. SSOE, Inc., ___ F.Supp.2d ___, 2006 WL 1235164 at *5 (E.D. Mich. 2006) (reliance on expert to compare building plans).

The Eighth Circuit similarly uses the "extrinsic" test and "rel[ies] on expert testimony to conduct the extrinsic test." *Moore v. Columbia Pictures Industries, Inc.*, 972 F.2d 939, 945 (8th Cir. 1992) (relying on defense experts who compared expressive elements). *But see Rottlund Co. v. Pinnacle Corp.*, ___ F.3d ___, 2006 WL 1676883 at *4 (8th Cir. 2006) (scrambling the tests and, unlike any other court, refusing to allow expert testimony on the issue of copying).

The Tenth Circuit allows expert testimony on what is an expression and not just an idea, whether elements are "stock" or not, what is original, and what is similar. *Autoskill Inc. v. National Education Support Systems, Inc.*, 994 F.2d 1476, 1493-1497 & n. 25 (1993). In another case, it has said the ultimate issue is whether "the accused work is sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996).

The Eleventh Circuit also allows expert testimony as part of its substantial similarity test. *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1257 (11th Cir. 1999) (comparison of screenplays).

The bottom line is this: Stripped of the vagaries and phrasing of the various tests, the six circuits in the "No expert" group tell district courts to determine similarities in theme ("genre"), total concept and feel (selection, arrangement, coordination), plot (including stock devices and historical f[illegible]), character, pace and setting by themselves and forbi[illegible] expert testimony on those issues. That is what the district court did in this case.

But the six Circuits in the "Experts allowed" group look at the same things and allow expert testimony. *Shaw, supra*; *Swirsky, supra* (which elements are "stock" is a fact issue).

As this review shows, the "inquiry into improper appropriation, both at trial and on appeal, remains one of the most contentious (and, not coincidentally, least precisely delineated) exercises in all copyright law[.]" A. Hartnick, *Intellectual Property: Substantial Similarity—A New Resource*, 230 N.Y.L.J. 3 (Dec. 15, 2003) (reviewing Osterberg treatise).

The Circuits that exclude expert testimony obstruct the pursuit of truth, defy the applicable federal evidence rules, and rely on the odd notion that a judge or juror is just supposed to "know" whether a plot is unique, or a device is "stock," or whether a historical assertion is a "fact." There is no reason to assume the "ordinary observer" or even the ordinary judge knows about literary genres, or what devices are "stock" or what facts are historically true or not. Expert witnesses can provide that information. *See* Nimmer, *supra* at § 13.03[E][3][a] (it is "hardly reasonable to expect laymen" to decide what is protectible or not by themselves); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) (no prohibition against damage experts in copyright cases).

This Court should grant certiorari to resolve this Circuit conflict. The conflict is well-established, shows no sign of diminishing, and affects the outcome in any case in which "substantial similarity" is the sole issue. Only when this Court resolves this issue will the outcome of a federal Copyright Act case not depend upon the Circuit in which it is filed. Moreover, as this case illustrates, the ability of an alleged infringer to bring a declaratory judgment action in a friendly circuit creates a widespread opportunity for forum shopping. That makes the issue of

whether expert testimony will be heard dependent on who wins the race to which courthouse. Given the need for a single uniform copyright law, the forum shopping aspect further supports the need for review by this Court.

CONCLUSION

The law does not require literal copying where both a plot idea and the expression of that idea in the details of the plot have been copied. Perdue does not claim that his thriller, which ultimately has a conventional religious message, is identical to Brown's. But Brown's substantial "non-literal similarity" to Perdue's protected expression is enough to impose liability for the unjust conduct that occurred here when, as the expert affidavits demonstrate, Brown took substantial elements of Perdue's novel, appropriated them as his own, and profited greatly from doing so.

FOR THESE REASONS, this Court should grant a writ of certiorari, reverse the decision below, and remand for discovery and a trial on the merits of the case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 05-4840-cv

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 18th day of April, two thousand and six.

Present:

HON. RALPH K. WINTER,
HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER,
Circuit Judges.

DAN BROWN AND RANDOM HOUSE, INC.,

Plaintiffs-Counter-Defendants-Appellees,

IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC., and COLUMBIA PICTURES INDUSTRIES, INC.,

Counter-Defendants-Appellees,

—v.—

LEWIS PERDUE,

Defendant-Counterclaimant-Appellant.

For Plaintiffs-Counter-Defendants-Appellees and Counter-Defendants-Appellees:

ELIZABETH A. MCNAMARA *of* Davis Wright Tremaine LLP (Linda Steinman and James Rosenfeld *of* Davis Wright Tremaine LLP, and Charles B. Ortner *of* Proskauer Rose LLP, *on the brief*), New York, N.Y.

For Defendant-Counterclaimant-Appellant:

DONALD N. DAVID of Cozen O'Connor, PC, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Daniels, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED.**

This appeal involves a copyright infringement action between Appellant Lewis Perdue (hereinafter "Appellant" or "Perdue"), author of two novels, *The Da Vinci Legacy* (1983) and *Daughter of God* (2000), and Appellees Dan Brown, Random House, Inc., and several associated entertainment companies (collectively "Appellees"), who respectively wrote, published, and made into a movie, the best-selling fiction novel *The Da Vinci Code* (2003).[1] After Appellant publicly alleged that Appellee Brown had, without permission, appropriated content from his two novels in creating *The Da Vinci Code,* Appellees filed suit against Perdue in federal court, seeking a declaratory judgment that they had not engaged in copyright infringement. Appellant promptly counterclaimed against Brown, his publisher, and the movie studios, seeking injunctive relief and $150 million in damages. In response to motions for judgment on the pleadings and summary judgment, the District Court for the Southern District of New York (Daniels, *J.)* ruled in Appellees' favor, granting declaratory relief to Appellees and dismissing all of Appellant's claims. We assume the parties' familiarity with the facts, procedural history, and scope of issues on appeal, which we reference only as necessary to explain our decision.[2]

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[1] On appeal to us, Appellant claims that *The Da Vinci Code* "plagiarized primarily" from *Daughter of God,* and, "to a lesser extent," from *The Da Vinci Legacy.* Appellant's brief does not, however, develop his allegation of copyright infringement on the basis of *The Da Vinci Legacy,* and both parties treat this claim as essentially abandoned. We therefore only consider Appellant's copyright infringement claim on the basis of *Daughter of God.*

[2] For a thorough summary of *Daughter of God* and *The Da Vinci Code* (which are the principal subjects of this litigation), *see Brown v. Perdue,* 2005 WL 1863673, No. 04 Civ. 7417 (GBD) (S.D.N.Y. Aug. 4, 2005).

We review *de novo* the district court's grant of summary judgment in favor of Appellees. *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1071 (2d Cir. 1992). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A court must decide if "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

To establish copyright infringement, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In the case before us, the parties do not dispute that Appellant obtained valid copyrights for his books. Appellant therefore needs only to demonstrate that Appellees copied original, constituent elements of his books. In the absence of direct evidence, copying may be established by showing "(a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectible material in the two works." *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993); *see also Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139 (2d Cir. 1992) (stating that a plaintiff must prove both "access and substantial similarity between the works" (internal quotation marks omitted)). For purposes of the summary judgment motion, Appellees have conceded that they had access to Perdue's books. This case therefore turns on the second part of the test: "whether, in the eyes of the average lay observer, *[The Da Vinci Code* is] substantially similar to the protectible expression in [*Daughter of God*]." *Williams v. Crichton*, 84 F.3d 501, 581, 587 (2d Cir. 1996).

In the case before us, the district court first distinguished between noncopyrightable and copyrightable work, following "a principle fundamental to copyright law," that "a copyright does not protect an idea, but only the expression of an idea." *Kregos*, 3 F.3d at 663 (internal citation omitted); *see also Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 239-40 (2d Cir. 1983) (holding that "[t]he similarity to be assessed must concern the expression of ideas, not the ideas themselves"). As to the copyrightable material in Appellant's books, the court concluded, on the basis of a comparison of "the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting of the [two sets of books]," that "no reasonable trier of fact could find the works substantially similar." *Williams*, 84 F.3d at 587-88 (internal quotation marks omitted). On that basis, the court granted summary judgment in favor of Appellees. Having considered the matter *de novo*, we now affirm the decision below for substantially the reasons given by the district court.[3]

We have considered all of Appellant's arguments and find them to be without merit. The judgment of the district court is hereby AFFIRMED.

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[3] The district court also decided that Appellant's unjust enrichment claims were preempted by federal copyright law, and therefore dismissed those state law claims. Appellant did not appeal that decision to us. As a result, the question of whether all state law claims of unjust enrichment are preempted by federal copyright law is not before us. *See Perez v. Hoblock*, 368 F.3d 166, 171 (2d Cir. 2004) (issues not raised on appeal are deemed abandoned); *see generally* Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 Harv. L. Rev. 703 (2006) (discussing the scope of federal preemption of state law claims under the 1976 Copyright Act).

For the Court,

ROSEANN B. MACKECHNIE,

Clerk of the Court

by: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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04 Civ. 7417 (GBD)

DAN BROWN and RANDOM HOUSE, INC.,
Plaintiffs,

—against—

LEWIS PERDUE,
Defendant.

LEWIS PERDUE,
Counterclaimant,

—against—

DAN BROWN and RANDOM HOUSE, INC., COLUMBIA PICTURES INDUSTRIES, INC., SONY PICTURES ENTERTAINMENT INC., SONY PICTURES RELEASING CORPORATION, IMAGINE FILMS ENTERTAINMENT, LLC,
Counterclaim-Defendants.

MEMORANDUM OPINION AND ORDER

GEORGE B. DANIELS, District Judge;

Plaintiffs Dan Brown and Random House, Inc. bring suit seeking declaratory judgment that the book, *The Da Vinci Code*, does not infringe the copyrights defendant

Lewis Perdue owns in his books, *Daughter of God* and *The Da Vinci Legacy.* Defendant asserted counterclaims alleging copyright infringement against plaintiffs and other counterclaim defendants.

Plaintiffs submitted a motion for judgment on the pleadings, or in the alternative, for summary judgment on their declaratory judgment claim. Defendant also moved for summary judgment on his counterclaims. The Court finds that there is no substantial similarity between Brown's book *The Da Vinci Code* and Lewis Perdue's books *Daughter of God* and *The Da Vinci Legacy.* Accordingly, defendant's motion for summary judgment is denied and plaintiffs' motion for summary judgment on their declaratory judgment claim is granted.

BACKGROUND

This is an action for copyright infringement under the Copyright Act of 1976, *as amended,* 17 U.S.C. §§ 101 *et seq.* (1994). Lewis Perdue claims that Dan Brown's novel, *The Da Vinci Code,* infringes upon copyrights he owns in *Daughter of God* and *The Da Vinci Legacy.*[1] Brown, who initiated this lawsuit, seeks a declaratory judgment that his work does not infringe upon Perdue's. Perdue counterclaimed, and included as counterclaim-defendants various parties associated with production of the anticipated motion picture version of Brown's *The Da Vinci Code.* Along with his copyright infringement claim, Perdue alleges unjust enrichment, and seeks an accounting of all income deriving from *The Da Vinci Code,* as well as a permanent injunction barring the dis-

[1] *The Da Vinci Code* was published by Doubleday, a division of defendant Random House, in March 2003. *The Da Vinci Legacy* was published in 1983 and *Daughter of God* was published in 2000.

tribution of the book and the motion picture adaptation. He demands damages totaling $150 million.

The threshold issue for deciding whether *The Da Vinci Code* infringes on copyrights in *Daughter of God* and *The Da Vinci Legacy* involves a determination of whether the works are "substantially similar." This determination requires a "detailed examination of the works themselves." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir.), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 721 (1986).

A. *The Da Vinci Code*

The Da Vinci Code[2] begins with the murder of Jacques Sauniere, the curator of the Louvre Museum, by an albino monk seeking the Holy Grail. The monk is a

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[2] The synopsis of *The Da Vinci Code* from its book jacket is as follows:

While in Paris on business, Harvard symbologist Robert Langdon receives an urgent late-night phone call: the elderly curator of the Louvre has been murdered inside the museum. Near the body, police have found a baffling cipher. While working to solve the enigmatic riddle, Langdon is stunned to discover it leads to a trail of clues hidden in the works of Da Vinci—clues visible for all to see—yet ingeniously disguised by the painter.

Langdon joins forces with a gifted French cryptologist, Sophie Neveu, and learns the late curator was involved in the Priory of Sion—an actual secret society whose members included Sir Isaac Newton, Botticelli, Victor Hugo, and Da Vinci, among others.

In a breathless race through Paris, London, and beyond, Langdon and Neveu match wits with a faceless powerbroker who seems to anticipate their every move. Unless Langdon and Neveu can decipher the labyrinthine puzzle in time, the Priory's ancient secret—and an explosive historical truth—will be lost forever.

The Da Vinci Code heralds the arrival of a new breed of lightning-paced, intelligent thriller utterly unpredictable right up to its stunning conclusion.

member of Opus Dei, a devout Catholic sect headed by Bishop Aringarosa, but is acting at the direction of a mysterious and unknown figure known simply as the "Teacher." Before dying, Sauniere leaves behind a series of clues meant for his estranged granddaughter, including disrobing and placing himself, before his death, in the position of Da Vinci's Vitruvian Man and writing a note that read "P.S. Find Robert Langdon." Langdon, a Harvard professor of religious symbology, is summoned to the Louvre by Bezu Fache, captain of the French judicial police, under the guise of helping to solve the crime. Fache, however, suspects that Langdon is involved with the murder. Also present at the crime scene is Sophie Neveu, a police cryptologist and granddaughter of the victim. Neveu recognizes that the inscription "P.S. Find Robert Langdon," is a message to her (P.S. stood for Princess Sophie). She warns Langdon that he is in danger and that he is suspected by the police of being the killer.

Langdon and Neveu fake an escape from the Louvre, buying them enough time to further dissect and unravel the clues and riddles Sauniere left behind. Using the Fibonacci numerical sequence, the couple determine that a poem left by Sauniere was an anagram of "Leonardo da Vinci! The Mona Lisa!" Neveu and Langdon follow Sauniere's clues to a key with a symbol of the Priory of Sion hidden in the frame of "Madonna of the Rocks," a painting by Leonardo da Vinci who himself served as a Grand Master of the Priory of Sion. Neveu and Langdon are led to the Paris branch of the Depository Bank of Zurich where they are presented with yet more riddles. Solving these riddles allows Neveu and Langdon to determine the account number for Sauniere's deposit box, where they discover a carved wooden box with a cryptex - a stone cylinder invented by Da Vinci to store

objects safely, which can only be opened with a proper password.

The reader learns through Langdon, who serves as an intellectual catalyst and religious historian of the novel, that Sauniere was the Grand Master of a secret society named the Priory of Sion, an organization founded centuries ago and charged with keeping the secret of the Holy Grail. The secret of the Holy Grail is the secret of the divine feminine; that Mary Magdalene was married to Jesus and that they had offspring. Through the years, the Priory of Sion protected this information and guarded the fact that Jesus and Mary Magdalene's bloodline still survives through their descendants.

Although the police converge on the bank, Langdon and Neveu escape with the help of the bank president, who was an old friend of Sauniere. They seek refuge at the home of Sir Leigh Teabing, the wealthy Royal Historian and authority on the Holy Grail. Teabing, portly and ruby faced, suffers from polio and walks with the help of aluminum braces and crutches. Teabing provides a tutorial on the legend of the Grail, shares religious history, and offers evidence that Jesus and Mary Magdalene were married and had a child. He also shares with them clues in Da Vinci's artwork of Mary Magdalene's role in early Christianity.

Teabing's home, however, serves only as a temporary refuge, as both the albino monk and the French police track Langdon and Neveu to Teabing's estate. The monk attacks, demanding the cryptex, but with Teabing's help, the monk is subdued and Teabing, his servant Remy, Neveu and Langdon flee from his estate to the airport, where they board Teabing's private jet and head for London. During the flight, Langdon, Neveu and Teabing work together to determine the password that would

unlock the cryptex. They believe that locked inside the cryptex is the location of the Holy Grail.

In London, Langdon, Neveu and Teabing search for clues to help them determine the password. The albino monk, through the help of Teabing's traitorous servant Remy, gets free, steals the cryptex from Langdon and Neveu and kidnaps Teabing. It is soon learned that Teabing is the "Teacher" and that he deceived Opus Dei into murdering Sauniere and the other Priory masters because he is obsessed with finding and releasing to the public the secret of the Holy Grail. Instead of killing Langdon and Neveu, Teabing implores Langdon to assist him in solving the password to open the cryptex. Langdon, having already determined the password and removed the contents of the cryptex, throws the cryptex in the air, presumably to destroy it. Teabing leaps to save it and falls to the ground as Fache and the police enter the room. Fache arrests Teabing, and Langdon reveals that he knew the password and saved the contents of the cryptex.

The cryptex, in fact, did not contain a map, but rather another riddle that leads Langdon and Neveu to Rosslyn Chapel in Scotland, where Neveu is reunited with her grandmother and brother, whom she thought had died long ago in a car crash. She learns that she is a descendant of Jesus and Mary Magdalene. Neveu's grandmother, during a conversation with Langdon, reveals that the possibility of the existence of the documents and proof is far more important than their actual existence. Neveu invites Langdon to stay. Although he refuses, they make plans to meet again in the near future and the two share an intimate kiss. In a final epilogue, Langdon realizes that the documents and other objects concerning Mary Magdalene are safely hidden underground in an inverted pyramid at the Louvre.

B. *Daughter of God*

At the opening of *Daughter of God*,[3] two Americans, Zoe Ridgeway, an art assessor and broker, and her husband Seth Ridgeway, an ex-police officer turned professor of philosophy and comparative religion, are invited to Zurich by Willi Max, an elderly former Nazi. Faced with imminent death and suffocating guilt, Max wishes to return his vast collection of art, which he stole from Jews during World War II, to their rightful owners. He asks Zoe to assist him in this task.

After their meeting, Max sends to Zoe's hotel a document purportedly to be one of the many lost writings of Emperor Constantine's biographer, Eusebius. The document tells the story of a second Messiah named Sophia who lived in a small remote village during the fourth century A.D. Unbeknownst to Zoe, Max has also sent to her hotel a small painting by a German artist named Frederick Stahl which the reader later learns, is the key to finding evidence to prove her existence. Sophia was an iilegitimate child born into a family of merchants and was raised in isolation until she was a teenager, when she began healing people with her touch. When the reports of her existence and the miracles she performed reached Rome, the Church, fearful of her growing fol-

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[3] The synopsis of *Daughter of God*, as revealed on its back cover, reads:

A FEMALE MESSIAH?

When Zoe Ridgeway, a prominent art broker, visits Switzerland with her husband Seth, she expects to purchase the rich estate of a secretive art collector. But before Zoe can complete the transaction, she and Seth are drawn into a thousand-year-old web of conspiracy, murder, and intrigue that begins and ends with the mystery of a female Messiah, a young girl whose existence, if proven, would explode the very foundation of Western culture.

lowing, brought Sophia and all the members of her village to Byzantium and interviewed them. After the interviews, the Romans killed them all, including the scribe responsible for recording the interviews. The Church wrapped all the victims in shrouds and buried them in a mass tomb in a cave. A week later, when the Romans went to inspect the tomb, one of the shrouds was empty, but contained the image of a fifteen year old girl, Sophia. Centuries later, Hitler gained possession of the sacred shroud, the Passion of Sophia (the story of her life), and other documents that explained her divinity. Hitler used these materials to bribe the Vatican into silence regarding Nazi atrocities. Hitler then hid all the materials in Austrian salt mines.

The story returns to the present day, where a few powerful groups are found vying for possession of the Sophia materials. The reader learns that KGB officials and the Russian mafia, believing that Willi Max has possession of materials that can lead to the Sophia materials, steal Max's art, kill Max, burn down his house, and kidnap Zoe. The Russians believe that the Sophia materials can help them gain more power and wish to use the materials to blackmail the Russian Orthodox Church. Another group, led by Cardinal Neils Braun, a former archbishop of Vienna and the head of a secretive, powerful Vatican intelligence force called the Congregation for the Doctrine of the Faith ("CDF"), also seeks possession of the Shroud. He intends to use the materials to become the next pope. Cardinal Braun tells an unnamed American about the second Messiah, and asks for the American's assistance in securing the shroud and related documents.

The story then flashes back to Seth Ridgeway, who, unable to find his wife, retreats to California despondent over his wife's disappearance. Seth is seen barely work-

ing, drinking, and spending a lot of time on his boat. He is visited by an unknown woman who reveals that the Stahl painting Max had sent to their Zurich hotel before Zoe's kidnaping may help to explain his wife's disappearance and lead him to her location. Suddenly, the boat is attacked and destroyed by unidentified gunmen. Seth escapes and finds help from George Stratten, an officer of the United States National Security Agency. Seth realizes that the painting may be in his unopened mail at UCLA. He slips away from the NSA agents assigned to watch him, retrieves the painting and leaves for Europe in search of his wife.

Meanwhile, in Europe, Zoe is held captive by the Russians in a warehouse. Over a period of a few months, she is interrogated about the painting and forced to help the Russians value their stolen art. Also held captive is a fellow art connoisseur who teaches her about the history of the "Great Goddess," and the presence of divine feminine elements in the world's religions and art. It is through their conversations that the history of the divine feminine is shared. Zoe manages to escape from the Russians and is met by the NSA's Stratton who brings her to a Zurich hotel. Seth, meanwhile, arrives in Europe and while traveling through Amsterdam and Zurich, engages in multiple gunfights with unknown assailants, at least some of them Russian. He manages to arrive at the same hotel where Zoe is staying, and they are reunited.

Together, Zoe and Seth bring the Stahl painting to a Zurich bank where bank officials use turpentine to remove the paint, revealing a gold ingot with Herman Goering's account number and safe deposit key. In Goering's safe deposit box are documents leading to the Sophia materials and instructions on how to dismantle the many traps in the salt mine where the Sophia materials are located. After another gun battle, Seth, Zoe and

Stratton go to the Austrian town of Alt Aussee, where they join forces with Father Hans Morgan, a priest active in the Nazi resistance who now serves as a Church reformer determined to reveal the truth concerning Sophia.

Zoe, Seth, Stratton, Morgan and others crawl through the mineshafts to the heavily fortified salt mine and find the shroud and the Passion of the Sophia in a jeweled box deep within the mine. Stratton, revealed as the unknown American who had promised to help Cardinal Braun recover the shroud, steals and escapes with the jeweled box. He brings it to Cardinal Braun, his true master, who intends to use it to blackmail the current Pope into stepping down and appointing him the successor. Just as Braun is preparing to head to Rome, Seth, Zoe and Morgen arrive at Braun's chalet and attack him. Father Morgan reveals to Braun that the Cardinal is his illegitimate son. Braun, caring only about the Shroud, dies after leaping into a fire to try and save it. In a role reversal, Zoe tells Seth that God has been good to them and that Seth should renew his lapsed faith. Prior to their ordeal, it was Seth who attempted to instill faith in Zoe. They learn that as a result of the fire at Braun's retreat, the entire structure burned except for portion of the floor in the shape of a woman where Sophia's shroud had last been.[4]

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[4] Although Perdue also asserts infringement of his earlier novel, *The Da Vinci Legacy*, he offers no arguments in his moving papers in support of his claims. He argues that his "copyright infringement claims in this action are based primarily on *Daughter of God*" and that "Legacy is mentioned because Brown also plagiarized many elements of Legacy in writing *Da Vinci Code*." Perdue's Memorandum of Law at 1. Indeed, despite his later pronouncement during oral argument that he did not seek to abandon this claim, after reading *The Da Vinci Legacy* and reviewing the parties' arguments, it is clear that any infringement claim based on *The Da Vinci Legacy* also

COPYRIGHT INFRINGEMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 1694, 123 L. Ed. 2d 317 (1993). The burden of demonstrating that no factual dispute exists is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). In deciding a motion for summary judgment, a court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment should be granted only when no reasonable trier of fact could find in favor of the nonmoving party. *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219, 1224 (2d. Cir. 1994).

In order to succeed on a claim of copyright infringement, "two elements must be proven: (1) ownership of a

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fails to survive Brown's motion for summary judgment. *The Da Vinci Legacy* concerns the quest for missing pages from Leonardo da Vinci's notebooks that contain information necessary to build a charged particle beam weapon. The hero's efforts to locate the missing pages pit him against the corrupt Bremen Legation and the evil Elect Brothers, who seek to construct the weapon. A thorough review of *The Da Vinci Legacy*'s plot, themes, characters and other elements supports a finding of noninfringement. Accordingly, to the extent that defendant Perdue continues to assert a claim of infringement based on *The Da Vinci Legacy*, that claim is also dismissed.

valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). In the absence of direct evidence, copying is proven by showing that (1) defendant had access to the copyrighted work, and (2) there is a substantial similarity of expression in the respective works. *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 137 (2d Cir.1998).[5] Perdue's claims, therefore, turns upon a finding of substantial similarity between the two books. The test for "substantial similarity" is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Warner Bros. Inc. v. American Broadcasting Companies*, 654 F.2d 204, 208 (2d Cir.1981) (quoting *Ideal Toy v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966)).[6] If the similarity concerns only noncopyrightable elements of a work, or no reasonable trier of fact could find the works substantially similar, summary judgment is appropriate. *Walker v. Time Life Films*, 784 F.2d 44, 48 (2d Cir. 1986).

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[5] For purposes of their summary judgment motion, plaintiff-counterclaim defendants have conceded that they had access to Perdue's books.

[6] In support of his claims of substantial similarity, Perdue also submits declarations from John Gabriel Olsson, a specialist in forensic linguistics and Gary Goshgarian, a professor of English at Northeastern University. However, because substantial similarity is judged by the spontaneous response of the ordinary lay observer, expert analysis of the similarities between the two works is not determinative. *See Denker v. Uhry*, 820 F.Supp. 722, 729 (S.D.N.Y. Dec. 8, 1992) (finding expert testimony unnecessary to assess substantial similarity if the proffered testimony does not deal with evidence or material that might help gauge the response of the lay reader).

It is "a principle fundamental to copyright law" that "a copyright does not protect an idea, but only the expression of an idea." *Kregos v. Associated Press,* 3 F.3d 656, 662 (2d Cir. 1993), *cert. denied,* 510 U.S. 1112, 114 S.Ct. 1056, 127 L.Ed.2d 376 (1994). "The distinction between an idea and its expression is an elusive one." *Id.* at 587-588. Judge Learned Hand, in *Nichols v. Universal Pictures Corp.,* 45 F.2d 119, 121 (2d Cir. 1930), provides the guiding principle:

> Upon any work, . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise, the [author] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.

Id. Furthermore, "the line [lies] somewhere between the author's idea and the precise form in which he wrote it down . . . protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." *Hogan v. DC Comics,* 48 F.Supp.2d 298 (S.D.N.Y. Jan 26, 1999) (citing Z. Chafee, *Reflections on the Law of Copyright,* 45 Colum.L.Rev. 503, 515 (1945)).

Similarly, *scenes a faire,* sequences of events that necessarily result from the choice of a setting or situation, do not enjoy copyright protection. *Williams v. Crichton,* 84 F.3d 581, 587 (2d Cir. 1996) (quoting *Walker,* 784 F.2d at 50); see also *Hoehling v. Universal City Studios, inc.,* 618 F.2d 972, 979 (2d Cir. 1980) ('incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given

topic" are *scenes a faire).* Furthermore, "thematic concepts . . . which necessarily must follow from certain plot situations" are not entitled to copyright protection. *Reyher v. Children's Television Workshop,* 533 F.2d 87, 91 (2d Cir. 1976).

When a work contains both protectible and unprotectible elements, the Court can only inquire whether "the protectible elements, standing alone, are substantially similar." *Williams v. Crichton,* 84 F.3d at 588 (quoting *Knitwaves, Inc. v. Lollytogs Ltd.,* 71 F.3d 996, 1002 (2d Cir. 1995). Any dissimilarity between the works will not automatically relieve the infringer of liability as "no copier may defend an act of plagiarism by pointing out how much of the copy he has not pirated." *Rogers v. Koons,* 960 F.2d 301, 308 (2d Cir.), *cert. denied,* 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992). The alleged infringer will be found innocent of infringement when the similarities between the protected elements of the copyrighted works and the allegedly infringing work are of small import quantitatively or qualitatively. *Id.*

A. *Perdue's Specific Claims of Similarity*

The *gravamen* of Perdue's complaint is that Brown copied the basic premise underlying *Daughter of God:*

> notions of a divine feminine, the unity of male and female in pagan worship, the importance of Sophia, the "Great Goddess" of the Gnostic Gospels, the fact that history is relative and is controlled by victors, not losers, the importance of the Roman Emperor Constantine in requiring a transition from a female to a male dominated religion, as well as to create a unified religion having a common dogma, the quest not only for physical objects, but for spiritual fulfillment.

Perdue's Local Rule 56.1 Statement of Undisputed Material Facts, ¶ 153; Perdue's Memorandum of Law at 5. He further argues that the following elements are common to both books: the role of the female; the Church's recasting of the great goddess as evil; the role of Emperor Constantine; Christianity's adoption of pagan practices; the existence of the divine feminine; the heroines' epiphany regarding the Great Goddess; the physical evidence of the divine feminine; the fact that there are keepers of the physical evidence; the Catholic Church's awareness of the existence of the Holy Grail and the Sophia Passion; the existence of two organizations who seek to obtain the physical evidence; similarities between Opus Dei and the Congregation for the Doctrine of Faith; the protagonists' unwillingness to participate in the struggle between the competitors to obtain the physical evidence; the female's equal claim to divinity as males and that through their union, they become much more than the sum of their parts; the enemy who acts as a wolf in sheep's clothing; the protagonists' realization that possessing the physical evidence is not as important as the understanding of what the physical evidence represents; the conclusion that the hero and heroine are themselves pursued by the quest for the physical evidence; similarities between the treatment of Mary Magdalene in *The Da Vinci Code* and Sophia in *Daughter of God;* the use of historical references, particularly Constantine, in both novels; the fact that both novels incorporate the use of a gold key; the novels' similar discussion of women, the Goddess, Creation and How God became a male; similar discussions of Mother Earth; the theme that people create their own gods; and lastly, a similar discussion in both novels regarding communion.

All of these similarities, however, are unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue's work. For example, although both novels discuss Emperor Constantine and the Council of Nicea, it is without question that references to historical figures and events constitute unprotectible elements under the copyright laws, as "[n]o claim of copyright protection can arise from the fact that plaintiff has written about such historical and factual items." *Alexander v. Haley.* 460 F.Supp. 40, 45 (S.D.N.Y. Sept. 21 1978) (citing *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966). Also, copyright protection does not extend to thematic concepts or scenes which must necessarily follow from similar plot situations. See *Reyher,* 533 F.2d at 91. Both *Daughter of God* and *The Da Vinci Code* involve the unprotectible *idea* of a mystery thriller set against a religious backdrop. As a mystery thriller, common themes of "the wolf in sheep's clothing," or the theme that "history is relative and is controlled by victors, not losers," or the theme that "through [the union of hero and heroine], they become much more than the sum of their parts," are unprotectible stock themes common to the genre. *See Williams v. Crichton,* 860 F.Supp. 158, 166 (S.D.N.Y. Aug 17, 1994), *aff'd Williams v. Crichton,* 84 F.3d 581 (2d Cir. 1996) (holding that themes commonly repeated in certain genre are not protectible by copyright as no one can own the basic idea for a story).

Indeed, it is not original in this genre to have a storyline whereby "two organizations or people who would stop at nothing, including murder, to obtain physical evidence," that there are keepers of this physical evidence, or that "the hero and heroine became unwilling participants in the struggle between the competitors to obtain the physical evidence." Furthermore, the fact that the

hero and heroine realize that possessing the physical evidence is not as important as the understanding of what the physical evidence represents, or that the reader is led to conclude that the hero and heroine are themselves pursued by the quest for the physical evidence, offers nothing new to this type of story. Moreover, because *Daughter of God* and *The Da Vinci Code* share a religious backdrop, Perdue's claims that the novels share a similar theme that "people create their own gods," and that both novels have "discussions of Mother Earth" and "discussions about communion" are not afforded copyright protection. Perdue has not alleged that his unique *expression* of these ideas and themes were copied. Ideas and general literary themes themselves are unprotectible under the copyright law.

Perdue also alleges various discrete similarities between the two plots. However, although both novels discuss the Catholic Church, such discussion is expected from a thriller with religious themes and is an unprotectible *scene a faire*. *See Williams v. Crichton*, 84 F.3d at 587 (similar scenic elements are unprotectible *scenes a faire* that follow naturally from the work's theme rather than the author's creativity). Similarly, Perdue's claims that both novels discuss Swiss bank accounts and gold keys or that the novels begin with a murder are unprotectible scenes a faire that precludes a finding of substantial similarity.[7] Perdue's claim that there are similarities between Opus Dei and the Congregation for the Doctrine of Faith, two real and existing organizations is also unprotectible. *Walker*, 784 F.2d at 49 (finding that copyright protection does not extend to facts).

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[7] Indeed, although there is clearly a gold key in *The Da Vinci Code*, *Daughter of God* references a "very small *ingot* fixed into a recess of the wood substrate on which the paint had been applied." *Daughter of God* at 312 (emphasis added).

A significant part of Perdue's argument focuses on the ideas and broad themes concerning the divine feminine, the important role of the female in early religion, the importance of Sophia, the "Great Goddess" of the Gnostic Gospels, and how she was re-cast by the Church as evil, the unity of male and fema[illegible]n pagan worship and Christianity's adoption of pagan practices as well as the importance of Emperor Constantine in requiring a transition from a female to a male dominated religion. Perdue argues that he "first incorporated these elements in" an earlier novel titled *Linz Testament* which he "extensively re-worked" into *Daughter of God.* Perdue's Memo at 5. A central theme of *The Da Vinci Code* is the suppression of the divine feminine in the Christian tradition. He claims that "the material plagiarized in [*The Da Vinci Code*] consists of an extensive and detailed synthesis of history and multiple schools of theology that Perdue created for *Daughter [of God]* and based on equally unique work expressed in *Linz [Testament]* and [*Da Vinci*] *Legacy.*" Perdue's Facts ¶ 212.

Perdue argues that Brown stole his "synthesis" of differing religious beliefs emanating from the Gnostic Gospels. He has made no factual allegations, however, to support a finding that Brown copied his *expression* of these ideas. Moreover, these ideas and themes find their origin in historical facts, events and figures, as well as pre-existing works. *See Hoehling,* 618 F.2d at 979 (finding that, despite plaintiff's claim that specific facts, ascertained through his personal research, were copied, such facts are unprotectible, as defendants "had the right to avail [themselves] of the facts contained in [plaintiff's] book" and "to use such information, whether correct or incorrect, in their own work") (citing *Greenbie v. Noble,* 151 F.Supp. 45, 67 (S.D.N.Y. 1957); *see also Alexander,* 460 F.Supp. at 45 ("where common sources

exist for the alleged similarities, or the material that is similar is otherwise not original with the plaintiff, there is no infringement"). In his Author's note in *Daughter of God,* Perdue himself states that "[t]his is a work of fiction based on fact. . . . The sections of this book dealing with the Nicean Conference and the events and religious controversies leading up to it are true and far better documented than any of the scriptures in the Hebrew or Christian Bible or the Muslim Koran." *Daughter of God* at 420. Perdue concedes that "[m]uch of his research [about the sacred feminine and the Great Goddess] involved the Gnostic Gospels, discovered at Nag Hammadi, Egypt in 1945, but not translated until the 1970's, and works commenting upon those Gospels." Perdue's 56.1 Statement, ¶ 156. Furthermore, there is no substantial similarity in the expression of the divine feminine in each book. In *The Da Vinci Code,* the divine feminine is expressed as Mary Magdalene, a true biblical figure, while in *Daughter of God,* the divine feminine figure is Sophia, a fictional second Messiah created by Perdue. As copyright protection "does not extend to facts or to true events, even if they are discovered through original research," Perdue's claims regarding these ideas and themes are unprotectible. *Walker,* 784 F.2d at 49.

B. *A Comparison of* The Da Vinci Code *and* Daughter of God

The critical examination which must be conducted, in order to determine whether *The Da Vinci Code* is substantially similar to *Daughter of God* to support copyright infringement, is a review of relevant similarities between the two works "in such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting." *Williams v. Crichton,* 84 F.3d at 588.

1. Thematic Expression

"In its ordinary meaning, a theme is understood to be the underlying thought which impresses the reader of a literary production, or the text of a discourse. Using the word 'theme' in such a sense will draw within the circle of its meaning age-old plots, the property of everyone, and not possible of legal appropriation by an individual." *Roe-Lawton v. Hal E. Roach Studios,* 18 F.2d 126, 127 (D.C.Cal. 1927). Indeed, thematic concepts which follow from similar plot situations are not afforded protection under the copyright laws. *See Smith v. Weinstein,* 578 F.Supp. 1297, 1302 (S.D.N.Y. Jan. 24, 1994). General themes expressed in *Daughter of God* are afforded no copyright protection. "[T]he essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization." *Reyher,* 533 F.2d at 91.

The Da Vinci Code's expression of the divine feminine and its related themes differ markedly from their expression in *Daughter of God.* In *The Da Vinci Code,* Mary Magdalene represents the Divine Feminine that was suppressed by the Church. Through Langdon's character, Brown shares with the reader the history and importance of women and the sacred feminine in early religion. Through Langdon's and Teabing's monologues, Neveu and the reader are introduced to the belief that Mary Magdalene was the wife of Christ and that they produced offspring. This secret, which the reader is shocked to learn represents the truth of the Holy Grail, was kept protected by a group called the Priory of Sion, whose military arm, the Knights Templar, guarded the secret with their lives. The reader eventually learns that Neveu is a descendant of Christ and Mary Magdalene.

In *Daughter of God,* a fictional second messiah named Sophia represents the Divine Feminine suppressed by the Church. Sophia, who existed around 325 A.D. in a remote mountain village near the Anatolian city of Smyrna (in present-day Turkey), was executed by the Romans after news of her miracles hit the Vatican. An early discussion between Zoe and Seth introduces the reader to Sophia and to Constantine's influence on the early church. Sophia's history is further shared through one of the villains, Cardinal Braun, who discusses it with NSA Agent Stratton, while the historical details of the Church's suppression of the divine feminine is shared through a conversation between Zoe and Thalia, a fellow captive. Evidence of Sophia's existence, and of the role the Church played in executing her, came into the hands of the Nazis during World War II. The search for this evidence is the foundation of *Daughter of God.* Rival groups, including a conservative arm of the Church, the Russian mafia and former KGB, and the heroes all strive to obtain this evidence for their own underlying purpose. Brown's expression of his religious themes in *The Da Vinci Code* differ markedly from Perdue's expression of his themes in *Daughter of God.*

2. Total Concept and Feel

The total concept and feel of a literary work is comprised of the way an author "selected, coordinated and arranged the elements of his or her work," *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 358, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991), taking into consideration similarities in "mood, detail or characterization." *Reyher,* 533 F.2d at 91-92. Where there is a marked difference in total concept and feel, summary judgment is appropriate. *Id.* at 92; *see also Denker v. Uhry,* 820 F.Supp. 722, 731 (S.D.N.Y. 1992), *aff'd,* 996

F.2d 301 (2d Cir. 1993). Although both novels at issue are mystery thrillers, *Daughter of God* is more action-packed, with several gunfights and violent deaths. *Daughter of God* also includes a perilous journey through an Austrian salt mine and includes sex scenes not present in *The Da Vinci Code*. *The Da Vinci Code,* on the other hand, is an intellectual, complex treasure hunt, focusing more on the codes, number sequences, cryptexes and hidden messages left behind as clues than on any physical adventure. For example, Neveu, Langdon, Teabing and his servant's escape from the police in a Range Rover through the dark woods proceeds at such a slow pace that it cannot reasonably be called a chase scene.

Furthermore, although *Daughter of God* references art and discusses religious history, *The Da Vinci Code's* treatment of these subjects involves more detail. Brown weaves his mystery through detailed discussions of Da Vinci's art, art and religious history and mathematical formulas. An early scene, involving Neveu and Langdon's attempt to decipher the clues Sauniere left at his murder site, references Leonardo da Vinci's Vitruvian Man, the Fibonacci sequence, the Divine Proportion, *Phi,* and the Mona Lisa. *Daughter of God*'s discussion of art, on the other hand, occurs principally through Thalia and Zoe's review of the art stolen by the Russians as they work to catalogue all the stolen pieces. No reasonable jury could conclude that the total concept and feel of *The Da Vinci Code* is substantially similar to that of *Daughter of God.*

3. Plot

A plot is "the story or narrative. It is the designed sequence of connected incidents. It is the thing which moves the [work] from cause to effect. It means, as its

etymology implies, a weaving together." *Golding v. RKO Radio Pictures, Inc.*, 193 P.2d 153, 163 (Cal.App. 2 Distr. 1948), *aff'd* 35 Cal.2d 690, 221 P.2d 95 (1950). Although "in its broader outline a plot is never copyrightable," *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), alleged similarities in plot and structure at "the next level of specificity" may be protectible. *Id.* at 49. Courts are to determine whether the fundamental essence and structure of the novels are substantially similar. *See Arden v. Columbia Pictures Industries, Inc.*, 908 F.Supp. 1248, 1260 (S.D.N.Y. Dec. 7, 1995) (finding no substantial similarities between the fundamental structure and essence of each plot).

At the most general level of abstraction, both novels tell a story based on religious and historical people, places and events. The factual details that underpin each book, however, are quite different. The scenes and events show no substantial similarity of expression in the respective works. For example, while the *The Da Vinci Code* weaves a story with historical references to Michelangelo and Leonardo da Vinci, Opus Dei and the Priory of Sion; *Daughter of God* discusses Adolph Hitler and the Nazis, Hermann Goering, Frederick Stahl, and the Congregation for the Doctrine of Faith. Indeed, *The Da Vinci Code*'s incorporation of mathematical subjects like Phi, the Divine Proportion and the Fibonacci Sequence into its story has no parallel in *Daughter of God.*

Daughter of God involves a husband's search for his missing wife. His search uncovers a religious secret involving a fictional second Messiah, the knowledge of which is being sought by a radical arm of the Catholic Church and by the Russian mafia and former KGB for their own evil purposes. The husband's search for his wife leads him to different parts of the globe. Further-

more, in *Daughter of God,* the search is for actual physical objects, including documents evidencing Sophia's existence and her burial shroud. In *The Da Vinci Code,* the plot centers on determining what the secret is. Langdon and Neveu's mission, as the protagonists, is to decipher, through clues left behind by her murdered grandfather as well as clues hidden in historical places and works of art, the ancient secret. Furthermore, Langdon and Neveu never actually find any physical objects. Rather, the secret they learn is that Neveu is a descendant of Christ, that her grandmother and brother are actually alive, and that Mary Magdalene's bones may be hidden beneath the inverted pyramid at the Louvre. The fundamental essence and structure of the plots are not substantially similar and offer no support to Perdue's infringement claim. *The Da Vinci Code* is simply a different story than that told by *Daughter of God.*

4. Characters

In determining whether characters are similar, a court looks at the "totality of [the characters'] attributes and traits as well as the extent to which the defendants' characters capture the total concept and feel of figures in [plaintiff's work]." *Walker,* 784 F.2d at 50 (internal quotations and citations omitted). What the character thinks, feels, says and does as well as the descriptions conveyed by the author through other characters' comments fill out a viewer's understanding of the character. *Warner Bros. v. American Broadcasting Cos.,* 720 F.2d 231, 241 (2d Cir. 1983). "At the same time, the visual perception of the character tends to create a dominant impression against which the similarity of a defendant's character may be readily compared, and significant differences readily noted." *Id.*

There is no substantial similarity between any of the characters in *The Da Vinci Code* and *Daughter of God.* The heroes and heroines are different in each book. In *The Da Vinci Code,* the hero is Robert Langdon, a bookish professor of symbology from Harvard. Langdon's physical attributes are not emphasized, rather, he serves as the intellectual wheel that keeps the plot moving. It is Langdon who solves most of the major riddles and questions, including the final puzzle at the climax. Interestingly, Langdon is secular, and his interests in religious history are purely academic. In *Daughter of God,* the hero is Seth Ridgeway, a former police officer who has athletic prowess and strong physical attributes. Seth retired from the police department after receiving several gunshot wounds. Although he is a professor of philosophy and religion, the book does not focus on his intellect. Unlike Langdon, Ridgeway experiences a crisis of faith because of his wife's disappearance.

The heroines also share few similarities. Sophie Neveu, the young French symbologist, was raised by her grandfather in a life of privilege. Her intellect, coupled with her knowledge of cryptology, allow her to assist in solving the many riddles and puzzles left by Sauniere. Seth Ridgeway's wife, Zoe, on the other hand, is a more mature, self-employed art appraiser. She is an expert in her field. She has been trained in detecting forgeries and grew up in a blue collar household.

Sir Leigh Teabing serves as the primary villain in *The Da Vinci Code,* but his evil role as the "Teacher," who masterminded Sauniere's execution, is not revealed until the end of the novel. He has two associates, Remy, his assistant, and Silas, the albino monk. Remy's involvement is minor while Silas serves the role as the threatening killer. Indeed, it is through Silas' hands that Sauniere and the other members of the Priory of Sion are

murdered. Teabing's quest for the Holy Grail is motivated by his distaste for the Church.

Daughter of God, on the other hand, has many villains. One set of villains include Russian mobsters and former KGB, who desire the Sophia documents and Shroud for power. Although the Russians dominate the early part of the book, their presence is minimized after Zoe kills the Hulk, her huge Russian captor, and escapes from their detention. Another set of villains include Cardinal Braun and his lackey, NSA Agent Stratton. Braun's desire for the Sophia materials also stems from a desire for more power. In this regard, as well as in physical attributes, he is nothing like *The Da Vinci Code*'s antagonist, Teabing, who is crippled and uses crutches when he walks. Further, although Perdue argues that Teabing and Stratton are both "shapeshifters" (because they first appear friendly and later reveal themselves as the enemy), such a characterization ignores the different roles each serves in their respective novels. Teabing is the ultimate villain in *The Da Vinci Code*. His mysterious alter-ego, the "Teacher," is smart, conniving, diligent and well planned. Stratton, on the other hand, is simply a lackey for Cardinal Braun. Stratton, from physical appearance to mental and intellectual characteristics, shares nothing in common with Teabing. Other main characters such as Bezu Fache, the police captain who chases Langdon and Neveu in *The Da Vinci Code,* Father Aringosa, the head of Opus Dei in *The Da Vinci Code,* and Father Hans Morgan, the reformist priest in *Daughter of God,* have no parallels in the other book.

5. Sequence, Pace and Setting

Although both *Daughter of God* and *The Da Vinci Code,* as mystery thrillers, enjoy fast paced scenes, the time sequence of each book differs considerably.

Daughter of God takes place over many months. Indeed, after the opening sequence introducing Zoe, Seth and Max in Switzerland, Seth is found in his boat *six months later,* still suffering from Zoe's disappearance. After Seth is visited by the strange woman with information concerning Zoe on his boat, the novel proceeds at a quick but steady pace over the course of a few weeks. *The Da Vinci Code,* however, starts quickly and moves quickly. The reader immediately gets a sense that time is of the essence. The period from Sauniere's death at the Louvre to the final confrontation at Westminster Abbey, the majority of the novel, takes place over a matter of days.

The setting of each book is also different. While the *The Da Vinci Code* takes the reader from Paris to London and visits landmarks such as the Louvre Museum and Westminster Abbey, *Daughter of God* begins in Zurich, travels through southern California, Amsterdam and Italy and ends in Austria. The characters, sequence, pace and setting of each book are not substantially similar and do not support an infringement claim.

A comparison of these different novels warrants a rejection of the claim that Brown's *The Da Vinci Code* infringes upon copyrights Perdue owns in his previous works *Daughter of God and The Da Vinci Legacy.*

REMAINING COUNTERCLAIMS

In his Third Counterclaim, Perdue alleges that "[a]s a result of [counterclaim defendants'] illegal and improper exploitation of [his] intellectual property, [counterclaim defendants] have been unjustly enriched at the sole

expense and to the sole detriment of [Perdue]." Perdue's Answer and Counterclaims ¶ 107.[8]

Under the Copyright Act, state law claims are preempted if "(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106." *Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). The works in question fall within the types of works protected under 17 U.S.C. §§ 102 and 103. Moreover, Perdue's unjust enrichment claim is based entirely on the validity of his copyright claim. He alleges no facts to support his unjust enrichment claim different from his copyright infringement claim. Accordingly, his unjust enrichment claim must also be dismissed.

Relatedly, Perdue's second counterclaim for an accounting of all income, expenses and profits related to *The Da Vinci Code*, and his fourth counterclaim for a permanent injunction enjoining counterclaim defendants from all activities related to the production of the motion picture version of *The Da Vinci Code*, must also be dismissed. His accounting claim is pled on the grounds that he is unable to ascertain the amount of money owed by plaintiffs without an accounting. As his underlying infringement claim is unsupportable, no money is owed and no accounting is necessary. Under that same prin-

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[8] Although dismissal of Perdue's federal claims allows dismissal of his state common law unjust enrichment claim without prejudice to their commencement in state court, this Court exercises jurisdiction over this pendant claim and dismisses it on its merits. *See United Mine Worker's of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

ciple, Perdue's derivative claim against the motion picture defendants must also be dismissed.

CONCLUSION

A reasonable average lay observer would not conclude that *The Da Vinci Code* is substantially similar to *Daughter of God*. Any slightly similar elements are on the level of generalized or otherwise unprotectible ideas. Defendant Perdue's motion for summary judgment is denied and all of his counterclaims are dismissed. Plaintiffs' motion for summary judgment is granted. Plaintiffs are awarded declaratory judgment declaring that plaintiffs' authorship, publication and exploitation of rights in and to *The Da Vinci Code* do not infringe any copyrights owned by defendant.

Dated: New York, New York
August 4, 2005

SO ORDERED:

/s/ GEORGE B. DANIELS
GEORGE B. DANIELS
United States District Judge